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RAYMOND E. JERNIGAN, Appellant)	
)	
and)	Docket No. 04-1093
)	Issued: September 7, 2004
DEPARTMENT OF THE NAVY, PUGET)	
SOUND NAVAL SHIPYARD,)	
Bremerton, WA, Employer)	
)	

Case Submitted on the Record

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

On March 15, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated February 12, 2004 finding an overpayment of compensation. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this overpayment decision.

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$13,153.95, for the period December 19, 1997 through July 25, 1998, because he had previously received schedule awards for eight percent impairment of the right arm; (2) whether the Office abused its discretion in denying waiver of the overpayment. On appeal appellant alleges that he is entitled to a schedule award for a nine percent impairment of the left upper extremity and a total nine percent impairment of the right upper extremity. However, the Office, in finding an overpayment of compensation, only allowed payment for a one percent impairment of the right upper extremity.¹

¹ Appellant has not appealed the underlying schedule award decisions.

FACTUAL HISTORY

Appellant, a 41-year-old fabric worker, filed a claim for benefits on October 14, 1988 alleging that he injured his right shoulder while loading a roll of herculite material onto a rack. The Office accepted the claim for a right shoulder strain. Appellant returned to work in April 1990 and experienced intermittent periods of disability.

On April 2, 1991 the Office granted appellant a schedule award for a five percent impairment of the right upper extremity for the period October 2, 1990 to January 19, 1991, for a total of 15.6 weeks of compensation.

Appellant filed another claim for benefits on June 7, 1992 alleging that he injured his right elbow when he struck a staging pipe. The Office accepted the claim for contusion of the right elbow. The Office subsequently accepted a claim for bilateral carpal tunnel syndrome and authorized bilateral carpal tunnel release surgeries.

On December 12, 1996 the Office granted appellant a schedule award for a three percent permanent impairment of the right arm for the period January 10 to March 15, 1996, for a total of 9.36 weeks of compensation.

In a report dated December 19, 1997, Dr. Michael S. McManus, a Board-certified orthopedic surgeon, provided physical examination findings relating to appellant's right and left upper extremities. He concluded that appellant had a total permanent impairment of the right upper extremity of nine percent and a total final permanent impairment of the left upper extremity of nine percent. The Office medical adviser reviewed this report on January 9, 1998 and concurred with the finding of nine percent permanent impairment of each upper extremity.

On February 11, 1998 the Office granted appellant a schedule award for a nine percent permanent impairment of the right arm and a nine percent permanent impairment of the left arm for the period December 19, 1997 to January 16, 1999, for a total of 56.16 weeks of compensation.²

On September 6, 2003 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$13,153.95, for the period December 19, 1997 to January 16, 1999, because the Office had failed to consider factors in appellant's previous schedule awards for 8 percent impairment of the right upper extremity and had, therefore, erred by paying the 1998 award for an additional nine percent impairment of the right arm. The Office noted that he had received compensation for 15.60 weeks based on a five percent impairment of the right arm by decision dated April 2, 1991 and received an additional 9.36 weeks for a three percent impairment of the right arm by decision dated December 12, 1996. As compensation for eight percent impairment had previously been paid to the February 11, 1998 schedule award, appellant was only entitled to an additional one percent impairment of the right arm or 3.12 weeks of compensation and the 28.08 weeks of compensation for nine percent of the left arm resulting in an overpayment of \$13,153.95. The Office found that he was without fault in the matter because

² Appellant did not seek review of the schedule award decision.

he could not have been aware that the payments he had been receiving were incorrect. The Office advised that, if he disagreed with the fact or amount of the overpayment, he could submit new evidence in support of his contention. The Office noted that, as he was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience. The Office informed appellant that he had the right to request a prerecoupment hearing on the matter of the overpayment and that any response he wished to make with regard to the overpayment should be submitted within 30 days of the October 30, 2003 letter.

By letter dated October 6, 2002, received by the Office on October 8, 2002, appellant requested an oral hearing. By decision dated November 27, 2002, the Office found that his request for an oral hearing was untimely filed.³

In a decision dated February 12, 2004, the Office finalized the overpayment in the amount of \$13,153.95. The Office noted that appellant had been advised by letter dated September 6, 2002, that a preliminary finding had been made that an overpayment had occurred, but had not responded within 30 days. The Office found that he was not entitled to waiver.

LEGAL PRECEDENT -- ISSUE I

Pursuant to section 8107⁴ of the Act, a compensation schedule has been established for loss or loss of use, of an enumerated member or function of the body. The compensation schedule provides that 312 weeks of compensation are payable for loss of an arm. This section of the Act also provides that compensation for permanent partial loss of use of a member may be for proportionate loss of use, of the member.⁵

The Act's implementing regulation⁶ prohibits the payment of duplicative schedule awards for the same member by the following provision:

“(c) The period of compensation payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid or payable under the schedule for an earlier injury if:

“(1) Compensation in both cases is for impairment of the same member or function or different parts of the same member or function or for disfigurement; and

³ The Board does not have jurisdiction over this decision, as it was issued more than one year prior to appellant's March 15, 2004 appeal to the Board. Appellant has not contested the decision.

⁴ 5 U.S.C. § 8107.

⁵ 5 U.S.C. § 8107(b)(19).

⁶ 20 C.F.R. § 10.404(c).

“(2) The Office finds that compensation payable for the later impairment in whole or in part, would duplicate the compensation payable for the preexisting impairment.”

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$13,153.95, for the period December 19, 1997 through July 25, 1998. The record shows that an overpayment occurred because the Office, in its February 11, 1998 schedule award decision, failed to factor in appellant’s previous schedule award payments totaling eight percent for right upper extremity and erroneously paid a total award for nine percent impairment of the right arm. Appellant was only entitled to an additional one percent impairment for impairment of the right arm. He had already been paid compensation for 15.60 weeks based on a 5 percent award for impairment of the right arm by decision dated April 2, 1991, 9.36 weeks for a 3 percent impairment of the right arm by decision dated December 6, 1996. As compensation for 8 percent impairment had already been awarded for the right upper extremity prior to the February 11, 1998 schedule award decision, appellant was entitled to only 1 percent additional impairment 3.12 weeks. The Office calculated the amount of overpayment by taking the total amount he was paid for his impairment of the right arm, \$29,516.53 and subtracting the 15.60 weeks for the 5 percent awarded in its April 1991 decision and the 9.36 weeks for his 1996 decision, which equal \$16,362.58, to find an overpayment of \$13,153.95. Based on this determination, the Office properly found that appellant received an overpayment of compensation in the stated amount during that period.

Contrary to the appellant’s argument on appeal the Office did find that he was entitled to a schedule award for a total permanent impairment of nine percent of the left arm and a nine percent of the right arm. The Office did not compensate him for a one percent impairment of the right arm, but made payment for nine percent impairment of each arm.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁷ provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.” Thus, a finding that appellant was without fault is insufficient, in and of itself, for the Office to waive the overpayment.

The Act’s implementing regulation⁸ further defines how information is to be obtained for waiver determinations. This regulation provides that:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment

⁷ 5 U.S.C. § 8129(a)-(b).

⁸ 20 C.F.R. § 10.438(b).

would defeat the purpose of the Act or be against equity and conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information with 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

ANALYSIS -- ISSUE 2

In the instant case, appellant did not submit any information regarding his financial situation within 30 days in response to the Office’s September 6, 2002 letter regarding his overpayment of compensation. He thus, failed to submit sufficient evidence showing that he qualifies for waiver under the “defeat the purpose of the Act” standard.⁹ Further, there is no evidence in this case, nor did appellant allege that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received from December 19, 1997 through July 25, 1998. His failure to respond to the September 6, 2002 letter by submitting the requested financial information within 30 days of the request resulted in the Office’s denial of waiver. Pursuant to its regulation, the Office, therefore, did not abuse its discretion by issuing its February 12, 2004 final decision denying waiver of recovery of the overpayment in the amount of \$13,153.95.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$13,153.95, for the period December 19, 1997 through July 25, 1998, because it failed to consider that he had previously received awards for eight percent impairment of the right arm. The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment.

⁹ See *Nina D. Newborn*, 47 ECAB 132 (1995).

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 7, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member